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No.

IN THE

Supreme Court Of The United States

October Term, 1996

Doug McKinney
Nayantara McKinney

Petitioner's,

v.

Gigi Doyle Baldwin

On Petition For Writ Of Certiorari

To The United States Court Of Appeals

For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Doug McKinney (Petitioner In Pro-Se)
Nayanyara McKinney (Petitioner In Pro-Se)
10520-4 Sunland Blvd.
Sunland, Ca. 91040
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35 pp

QUESTIONS PRESENTED

On July 17, 1990 petitioner Doug McKinney and Nayantara McKinney filed for personal Chapter 7 Bankruptcy. Plaintiff never showed up for the Bankruptcy hearing to contest it. Yet on October 17, 1990 Petitioner was served with papers for non-dischargeability of a debt that arose from a Construction Corporation which Nayantara McKinney had no dealings with.

Petitioner presented many related cases in defense.

1. If a United States Court enters a decision in conflict with another United States Court, is it proper?
2. If the Bankruptcy Court let the proceedings contihue even though the plaintiffs time for filling was beyond the time limit allowed by law, is it proper for the court to do?

Petitioner could not afford legal counsel and asked the Court for tirne or appointed counsel.

3. Is it proper for the Court to deny the Petitioner proper legal representation?
4. Is it allowed for the Court to continue proceedings if the plaintiff failed to appear and Petitioner filed a motion to dismiss the case on the grounds that Plaintiff failed to prosecute?
5. Is it proper for the court to rule in favor of the plaintiff whose testimony was erroneous and without clear and convincing evidence?
6. Is it proper for the court to rule in favor of the plaintiff even though the Court found that there was no fraud intended by the Petitioner?
7. Is it proper for the court to rule in favor of the plaintiff in a personal Bankruptcy when the debt arose out of a contract with a corporation (Home Base Construction Inc.)?

QUESTIONS PRESENTED - Continued

8. Should the amount of the judgment against the Petitioner be reduced if the Plaintiff received a portion of the amount of judgment form the corporations bonding company?

9. If the contract Between Home Base Construction called for arbitration was it legal for the plaintiff to file for non-dischargeability of the debt?

10. Should a United States Court disregard all related cases in other courts or higher Courts that support the decision on behalf of the Petitioner?

11. If the Petitioners wife did not benefit financially in any way from monies received from the Plaintiff through the corporation, is it legal for the court to burden her with the debt?

12. If the petitioner didn't benefit but in fact filed Bankruptcy due to the over cost of the Plaintiffs project, is it legal to make his personal debt non dischargeable?

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Bankr. Act, 14 (c) (1),
11 U.S.C.A. 32 (c)(1);
18 U.S.C.A. 152

PRAYER

The petitioner, Doug McKinney respectfully prays that a writ of *certiorari* be issued to review the judgement and opinion of the United States Court of appeals for the Ninth Circuit issued on July 27, 1996.

OPINION BELOW

The opinion of the United States Court of appeals for the Ninth Circuit issued on July 27, 1996 affifming the judgement of this case is not is in conflict with the decision of another United States Court of appeals.

JURISDICTION

This Court has jurisdiction of his action based on Rule 10 of the Rule of the Supreme Court of the United States providing that cases in the courts of appeal may be reviewed by the Supreme Court by writ of *certiorari*. This petition is timely filed, since petitioner's motion for rehearing was denied on July 27, 1996.

PROVISIONS, CASES AND STATUTES INVOLVED

(a) Bankruptcy Rules, Rule 8013 states: On an appeal the District Court or Bankruptcy Appellate Panel may affirm, modify, or reverse a Bankruptcy Judge's Judgment, Order, or Decree or remand with instructions for further proceedings. Findings of fact, whether based on oral documentary argument evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Bankruptcy Court to judge the creditability of the witnesses.

(b) Bankruptcy Rule 4005. Bankr. Code, 11 U.S.C.A. 727 (a) (4) (A). The statutory right to discharge in Bankruptcy is construed liberally in favor of debtor and strictly against objecting creditor. In re: Leichter, 197 F.2d 955, 959, In re: Cycle Accounting Services, 43 B.R. 264, 270, In re: Kirst, 37 B.R. 275, 278, In re: Irving 27 B.R. 943, 946. In re: Decker, 595 F. 2d 185 (3rd Cir. 1979) In re: Gelfand, 47 B.R. 876 12 C.B.C. 2d 682 (Bankr. E.D. Pa. 1985). Roberts v. W.P. Ford, 169 F. 2d 151.

(c) Bankruptcy Rules Procedure Rule 4005. Under 11 U.S.C.A 727 (a) (4) (A); the Court may refuse to discharge the debtors if they made (1) a false oath, (2) in or in connection with their bankruptcy case, (3) knowingly, and (4) fraudulently. The burden of proving each of these four elements rests on the creditor objecting to the discharge. Bankruptcy Rules Procedure Rule 4005 In re: Mascolo, 505 F.2d 274, 276, In re: Seablom, 45 B.R. 445, 449, In re: Kimzey, 761 F 2d 421 Cir. 1985.

(d) Bankr. Code, 11 U.S.C.A 727 (a) (4) (A); Bankruptcy Rules Procedure Rule 4005, 11 U.S.C.A. The burden of proving elements of exception to discharge for making false oath rests on creditor objecting to the discharge.

(e) Bankr. Code, 11 U.S.C.A 727 (a) (4) (A). Reckless indifference to the truth is the equivalent of fraud for purposes of barring discharge for making false oath; but fraudulent intent must be actual, not constructive.

(f) Adlman, 541 F2d 999 (2d Cir. 1976). The objecting creditor must prove by a pre- pondenderance of the evidence that the debtors made the false statement fraudulently, that is, specifically with the intent to deceive. In re: Gonday, 27 B.R. 428, 433, In re: Irving, 27 B.R. 943, 945, In re: Gullifer 14 B.R. 183, 185.

(g) In re: Seablom, 45 B.R. 445, 449, In re: Sylvester v. Stone, 11 B.R. 209 (1981) Appellant is not to be denied because information is missing or inaccurate, but because information was omitted or altered with the specific purpose of working a fraud.

(h) The language in Bankruptcy Code, 11 U.S.C.A. 523 (a) (2) (A) says that to prevent discharge on grounds of false pretenses, false representation, or actual fraud, creditor must prove that debtor made knowing false representations with intent to deceive the creditor and that the creditor relied to his detriment as a result of the representation, and creditor bears burden of proving each element by clear and convincing evidence. In re: Simpson 29 B.R. 202, 209. In re: Vissers, 21 B.R. 638, 639.

(i) In re: Haddad, Norton, supra; Matter of Curry, 12 B.R. 421, In re: Keller 72 B.R. 599 According to law, failure to disclose certain information to Plaintiff does not constitute fraud.

(j) The language in Bankr. Code, 11 U.S.C.A 727 (a) (4) (A) requires that we draw this critical distinction before deciding whether the benefits of discharge should be withheld from the debtor. To come within the purview of the statute, it is not enough to establish that the verified statement in the petition was false. The objecting creditor must prove by a preponderance of the evidence that the debtor made a false statement fraudulently, that is, specifically with the intent to deceive. In re: Gonday 27 B.R. 428, 433, In re: Irving 27 B.R. 943, 945, In re: Gullifer 14 B.R. 183, 185, In re: Brame, 23 B.R. 196, 200 (Bkrtcy. W.D.Ky. 1982.

(k) S. Bok, Lying: Moral Choice in Public and Private Life (1978), 6 (emphasis in original). Bankruptcy Code 11 U.S.C.A. 727. The question of lying or not is not settled by establishing the truth or falsity of what you say. In order to settle this question you must know whether it was meant to mislead.

(l) Bankruptcy Code 11 U.S.C.A. 727. As the debtors fresh start is one of the primary purposes of Bankruptcy law, exceptions to discharge must be strictly construed. The [Supreme] Court on numerous occasions has stated that "one of the primary purposes of the Bankruptcy Act" is to give debtors a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. In re: Local Loan Co. v. Hunt, 292 U.S. 234, 244 [54 S. Ct. 695, 699, 78 L. Ed. 1230] (1934). In re: Thomas v. Ashley 5 B.R. 262 (1980), Mason Lumber v. Martin, 70 B.R. 146 (1986), In re: Butler v. Lind, 6 B.R. 374 (1980)

(m) Bankruptcy Code 11 U.S.C.A. 727. The House report accompanying the Bankruptcy Reform Act has described Section 727 as "the heart of the fresh start provisions of the Bankruptcy law". H.R. Rep. No. 595, 95th Cong., 1rst Sess. 384 (1977), U.S. Code Cong. & Admin. News 1978, pp. 5787, 6340. In re: Vickers, 577 F. 2d 683, 687 (10th Cir. 1978). In re: Brown v. Felsen 442 U.S., In re: Mason Lumber v. Martin, 70 B.R. 146 (1986), In re: Butler v. Lind, 6 B.R. 374 (1980).

(n) Bankr. Act, 14 (c) (1), 11 U.S.C.A. 32 (c)(1); 18 U.S.C.A.152 Kornreich v. Gullifer, 14 B.R. 183 D. Maine, 1981. To justify denial of discharge of bankrupt on grounds that bankrupt knowingly and fraudulently made false claim in or in relation to his bankruptcy proceeding, testimony must not only be proven false and not result of error, mistake or inadvertence, it must also constitute intentional untruth.

(o) In re: First National Bank v. Serafini, 113 B.R. 692 Subsequent to the date of the judgment of the District Court, in the United States Supreme Court in Grogan v. Garner, U.S., 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991) reversed the Eighth Circuit Court of Appeals and held that a " preponder-ence of the evidence" standard, rather that a "clear and convincing" standard applies to all exceptions from the dischargeability of debts contained in Bankruptcy Code 523 (a) , including the nondischargeability for fraud provision.

(p) Bankr. Act, 14 (c) (1), 11 U.S.C.A. 32 (c)(1); 18 U.S.C.A. 152 Where there is no salary or nothing in the record to prove fraud the debt is to be discharged. In Re: Roberts v. W.P. Ford, 169 F. 2d 151, In re: Leichter 197 F. 2d 955.

STATEMENT OF THE CASE

(a) NATURE OF THE CASE:

This case arises from an alleged breach of contract by Appellee Gigi Doyle Baldwin. A contract that was entered into on June 22, 1989 between Home Base Construction Inc. and Appellee Gigi Doyle Baldwin and signed by Appellant Doug McKinney a representative of Home Base Construction Inc. for the construction of a 900 square foot second story room addition.

Home Base Construction Inc. was terminated from the project because of a number of reasons and Appellant Doug McKinney filed for personal Bankruptcy on July 17, 1990.

After learning about Appellants filing for Relief under 11 U.S.C. Section 701 et seq, Appellee filed a complaint on January 16, 1991 to Determine Dischargeability of a Debt.

(b) COURSE OF PROCEEDINGS

During the course of the proceedings the Appellees attorney has tried to paint a picture to the court that the Appellant is an undesirable character and uncooperative, has lied on the Appellant and has displayed the qualities of an untrusting individual, namely Fredrick Greenblatt.

Appellant made a motion to the Bankruptcy court to dismiss the case because the Appellee didn't file an objection to the discharge until after the time limit set by law and the proceedings continued.

Appellant also made a motion to the court to dismiss the case because the Appellee or Attorney failed to appear but the court proceedings continued.

After the trial proceedings the court ruled in favor of the Appellee eventhough there was no evidence to support the Appellees case. So on November Appellant filed an appeal from the Judgment.

STATEMENT OF FACTS

1. Plaintiff failed to show clear and convincing evidence to support her case and Plaintiffs testimony was in fact clearly erroneous. Rules Bankr. Proc. Rule 4005, 11 U.S.C.A.
2. On pg. 74 0f Excerpts Of Record, Appellee stated that she wasn't in a hurry to have her project completed, but on pg. 26 0f Excerpts Of Record) she stated that she wanted to have the job started right away. The fact that she also stated (On pg. 74 0f Excerpts Of Record) that she was living with a very upset mother also indicates that she wanted the project started in a hurry.
3. On pg. 75 0f Excerpts Of Record she stated she wanted the room as a sewing room but On pg. 24 0f Excerpts Of Record she stated that she needed the room for her mother because the house wasn't big enough for them.
4. On pg. 24 0f Excerpts Of Record she stated she wasn't sharing a room with her mother but On pg. 24 Excerpts Of Record she stated she was only sharing the room while the construction was in progress. So if she needed the room for her mother where was her mother sleeping before?

5. Appellee states On pg. 76 0f Excerpts Of Record that Appellant hired only day laborers to work on her project but On pg. 77 & 78 0f Excerpts Of Record she stated that she knew several workmen that were not common day laborers. On pg.79 0f Excerpts Of Record she stated that she paid one of Home Base Construction Inc. employees to help finish her project.

6. On pg.80 0f Excerpts Of Record the Appelee stated she contracted with Princeton/Terry Powell to do some work for her who was an ex-employee of the Appellants and lied to the court on pg. 79 0f Excerpts Of Record when she stated she did not contract with Princeton/Terry Powell. (pg. 100, 103, 105, 106, 108, 109, 110, 0f Excerpts Of Record.

7. On pg. 81 0f Excerpts Of Record testimony of Richard Johnson also shows that Appellant hired competent workmen. On pg. 82 & 83 0f Excerpts Of Record Appelee also states that there was no need for new building plans to be drawn for the project, making her claims erroneous and On pg. 84 0f Excerpts Of Record Appellee stated that Appellants workers were competent.

8. In Appellees summons on pg. 48, 51 & 52 of Excerpts Of Record and On pg. 85, 44 & 86 0f Excerpts Of Record she claimed that the work done by Appellant had to be demolished and on Pg. 76 & 49 Appellent claimed that Appellants work never passed inspection and Appellant only completed framing but On pg. 87 & 44 0f Excerpts Of Record the Appellee stated that Appellant Provided electrical and plumbing work. On pg.88 0f Excerpts Of Record Appellee also admits that she used Appellants employee Bob Ferris to complete her electrical work. On pg. 29, 0f Excerpts Of Record) the building inspectors testimony also states that corrections had to be made but no mention is made of de

molishing the project. On pg.30 0f Excerpts Of Record the Appellees witness also stated that work performed by Appellant did pass inspection, On pg. 89, 90 & 91 0f Excerpts Of Record Appellees witness also stated that other work done by Appellant was approved. Showing once again the testimony by the Appellee is erroneous.

9. The Appellee stated in her summons that Appellant abanded the project On pg. 92 & 43 of the Excerpts Of Record but On pg. 100, 44 0f Excerpts Of Record she states that I wanted more time to finish the project and again On pg. 43 0f Excerpts Of Record the Appellee stated she requested that Appellant not continue the project. Also On pg. 43 0f Excerpts Of Record Appellee she made a decision to get other contractors to finish her project and on pg. 68 Appellee states that she Terminated the Appellant. Testimony of Richard Johnson On pg. 93 0f Appellants Appendix to Brief also proves Appellant did not abandon the project.

10. The Appellee On pg. 28 0f Excerpts Of Record stated that there were no added extra expenses on the project yet On pg. 28, 34 & 31 0f Excerpts Of Record she stated she knew about extra work. She also states On pg.32 & 33 0f Excerpts Of Record that she read and signed a contract stating extra work is an added expense. Appellee also stated On pg.94 0f Excerpts Of Record that Appellant would just throw in about $7,000.00 worth of extra work for no cost. These kind of statements made by the Appellee again show how unreliable and erroneous her testimony is.

11. Appellee also On pg. 78 0f Excerpts Of Record the Appellee stated that she only knew one of the employees working for Appellant yet in her previous testimony On pg. 77 0f Excerpts Of Record she stated she knew many more employees. On pg. 77 0f Excerpts Of Record she also claimed she didn't know Richard

Johnson who had several conversations and contact with her, which calls into question of how could she remember a conversation with Appellant at the beginning of our meeting.

12. Appellant also charges that Appellee and her mother interfered with the production of work, pg. 95, 96, & 97 0f Excerpts Of Record.

13. The Honorable Lisa H. Fenning also stated On pg. 53 & 69 0f Excerpts Of Record that the findings of the court was that Appellant did not Abandon the project and that Appellant did not enter into the contract with a black heart intending to steal Appellees money. On pg. 98 0f Excerpts Of Record the Honorable Lisa H. Fenning also stated that it is sometimes that judges can be fooled, indicating that she may have been wrong in her decision.

14. Appellant did in fact tell Appellee that he was waiting for a Corporate Contractors License and never misrepresented himself. (pg. 19, 20 & 27 of the Excerpts Of Record).

15. Appellant did not abandon the project but did everything in his power to complete the project (pg. 68, 93, 43 & 44 0f Excerpts Of Record.

16. Appellant is in fact Bankrupt.

17. Nayantara McKinney was never part of Home Base Construction Inc. (pg.57 of the Excerpts Of Record).

18. Appellant is not an Attorney and was not properly represented (pg. 71 & 72 of the Excerpts Of Record).

19. Appellee is claiming expenses for materials having nothing to do with the contract between Home Base Construction Inc. (pg. 101, 103, 104, 105, 106, 107, 108, 109, 110 of the Excerpts Of Record).

20. Appellant did hire competent workmen (Pg 84) of the Excerpts Of Record.

21. Appellant provided supervision for the project (pg. 77, 78, 79, 82, 83 & 84 of the Excerpts Of Record).
22. All the evidence in the proceedings support the Appellant and not the Appellee.
23. Appellant was not afforded the privilege of Bankruptcy under Bankruptcy Rules, Statutes and Related Cases mentioned in Appellants Legal Argument.

REASONS FOR GRANTING THE WRIT

The United States Court of appeals for the Ninth Circuit on July 27, 1996 affifmed the judgement of this case and is in conflict with the decision of another United States Court of appeals.

This Court has jurisdiction of his action based on rule 10 of the Rule of the Supreme Court of the United States providing that cases in the courts of appeal may be reviewed by the Supreme Court by writ of *certiorari* .

In the Courts Memorandum Dated December 1, 1994 states it decided to proceed on the briefs without oral argument. The appellant is arguing that in order to determine the credibility of a witness, that oral argument is the only true way this can be done with any real justice.

The court also states a lot of facts to support it's decision about misrepresentation of having a contractors license. But there is no evidence other than the Appellees statements to support her case in this area. In fact if a salesman representing sears were to give an estimate to do a job and used sears license number on the contract, there is nothing wrong with that. Appellant was representing His partner. And the Appellee Knew of this arrangement. And there is no fact anywhere that she didn't.

The court also states as a fact that Appellee would not have hired Appellant if he was not a licensed contractor, but Appellee did hire unlicensed contractors to complete her project. Also in the courts discussion it states (1) the debtor made the representations (2) at the time he knew they were false (3) he made them with the intention and purpose of deceiving the creditor. The Appellant is asking where is the conclusive proof of this. In fact the District court states the Appellant did not intend to commit fraud.

The court also found that the Appellee was a more reliable witness. But the record shows many inconsistances in her testimony.

The court states that Appellants testimony was contradictory but where is the Proof? Other than the lies of the Appellee.

The fact is, is that the facts support the Appellants testimony far more than the Appellee. The court it seems is acting as the Appellees attorney and has not looked closely at all the evidence and facts of the case to give a fair judgment.

In fact, all the testimony, exhibits, facts and related cases in the Appellants behalf should have the same consideration as the Appellee.

As far as the time limit for filing for non-dischargeability of debt by the Appellee. The facts of record speak for themselves. Appellant filed for Bankruptcy on July 17, 1990, The Appellee didn't file a complaint until Jan. 16, 1991. The Appellant did mention this to the district court in the first hearings but the court let the proceedings continue. Again, had the Appellant been properly represented in this case the out come would not have been the same.

The court stated that Appellant received monies in excess. But I put this question to the court! If you called for an estimate for a 900 square foot second

story room addition the average cost would be $125,000.00, so if Applellant completed most framing, plumbing, electrical, paid professional and day laborers, had several problems on the job including weather and change orders and paid for some work to be done two to three times, where did the money come from? The money didn't come from the Appellee eventhough she signed a contract to pay extra for any and all of these items. Which brings us to the point of community asset.

In no way did Appellant or his wife benefit from this business. To the contrary it destroyed our well being financially as well as physically and has left the Appellant disabled.

This Judgment was given in behalf of the Plaintiff without any clear and convincing evidence to support Plaintiffs case other than her testimony, that was inconsistent throughout the proceedings. In fact all the evidence in the case is in favor of the Appellants testimony showing that the Courts Judgment is erroneous.

The court found that there was no fraud intended by the Appellant and yet stated that Appellant misrepresented himself, which is contradictory in itself.

There was also never any dispute to show that Appellant is not bankrupt. The Appellant also filed a personal Bankruptcy and the contract was between Home Base Construction Inc. and not Doug and Nayantara McKinney.

The Appellee also did not file an objection to the Appellants Bankruptcy until beyond the time limit set forth by the law.

The Appellant was also denied proper legal representation at the time of his trail by the court, this is clear because with all the evidence and Rules of the Bankruptcy Act pointing to the decision being in favor

of the Appellant he still lost the case. Therefore the Appellant finds that the Courts Judgment is erroneous, in view of the fact that the evidence, the Erroneous testimony of the Appellee, the Statutes of Law and the Table of Cases are all in favor of the Appellant.

Appellant is respectfully asking the United States Supreme Court to grant relief from this judgment so that the true purpose of establishing the Bankruptcy Law can be put to use in this case. Myself and my family would like a chance to make a new start in our lives.

Appellant is also asking that if this judgment is not reversed that it not be against Nayantara McKinney who was no part of Home Base Construction Inc..

The Honorable Lisa H. Fenning also stated On pg. 51 & 52 of the Transcript of July 15, 1992 that the findings of the court was that Appellant did not Abandon the project and that Appellant did not enter into the contract with a black heart intending to steal Appellees money. On pg. 58 of the Transcript of July 15, 1992 the Honorable Lisa H. Fenning also stated that it is sometimes that judges can be fooled, indicating that she may have been wrong in her decision.

Debtor is asking this court to reverse the Lower Courts decision or at least modify this case so the Appellant can gain relief from this judgment so that the primary purposes of the Bankruptcy law can be realized in this case because the judgement is without merrit in several areas. Bankr. Code, 11 U.S.C.A. 727.

Bankruptcy Rules, Rule 8013 states: On an appeal the District Court or Bankruptcy Appellate Panel may affirm, modify, or reverse a Bankruptcy Judge's Judgment, Order, or Decree or remand with instructions for further proceedings. Findings of fact, whether based on oral documentary argument evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Bankruptcy Court to judge the creditability of the witnesses.

Bankruptcy Rule 4005. The statutory right to discharge in Bankruptcy is construed liberally in favor of debtor and strictly against objecting creditor and this did not take place. Bankr. Code, 11 U.S.C.A. 727 (a) (4) (A). In re: Leichter, 197 F.2d 955, 959, In re: Cycle Accounting Services, 43 B.R. 264, 270, In re: Kirst, 37 B.R. 275, 278, In re: Irving 27 B.R. 943, 946. In re: Decker, 595 F. 2d 185 (3rd Cir. 1979) In re: Gelfand, 47 B.R. 876 12 C.B.C. 2d 682 (Bankr. E.D. Pa. 1985). Roberts v. W.P. Ford, 169 F. 2d 151.

Under 11 U.S.C.A 727 (a) (4) (A); the Court may refuse to discharge the debtors if they made (1) a false oath, (2) in or in connection with their bankruptcy case, (3) knowingly, and (4) fraudulently. The burden of proving each of these four elements rests on the creditor objecting to the discharge. Bankruptcy Rules Procedure Rule 4005 In re: Mascolo, 505 F.2d 274, 276, In re: Seablom, 45 B.R. 445, 449, In re: Kimzey, 761 F 2d 421 Cir. 1985.

The burden of proving elements of exception to discharge for making false oath rests on creditor objecting to the discharge and Plaintiff has nor has never had any proof because it isn't true. Bankr. Code, 11 U.S.C.A 727 (a) (4) (A); Bankruptcy Rules Procedure Rule 4005, 11 U.S.C.A.

Reckless indifference to the truth is the equivalent of fraud for purposes of barring discharge for making false oath; but fraudulent intent must be actual, not constructive. Bankr. Code, 11 U.S.C.A 727 (a) (4) (A). In Re: Adlman, 541 F2d 999 (2d Cir. 1976). The objecting creditor must prove by a pre- pondenderance of the evidence that the debtors made the false statement fraudulently, that is, specifically with the intent to deceive. In re: Gonday, 27 B.R. 428, 433, In re: Irving, 27 B.R. 943, 945, In re: Gullifer 14 B.R. 183, 185.

Appellant is not to be denied because information is missing or inaccurate, but because information was omitted or altered with the specific purpose of working a fraud. In re: Seablom, 45 B.R. 445, 449, In re: Sylvester v. Stone, 11 B.R. 209 (1981)

The language in Bankruptcy Code, 11 U.S.C.A. 523 (a) (2) (A) says that to prevent discharge on grounds of false pretenses, false representation, or actual fraud, creditor must prove that debtor made knowing false representations with intent to deceive the creditor and that the creditor relied to his detriment as a result of the representation, and creditor bears burden of proving each element by clear and convincing evidence. In re: Simpson 29 B.R. 202, 209. In re: Vissers, 21 B.R. 638, 639.

The language in Bankruptcy Code, 11 U.S.C.A. 523 (a) (2, 6), 701 et seq. There was no evidence that Appellant made any false representations in order to obtain a building contract from Appellee. Accordingly fraud has not been shown to to be part of Appellants actions. Therefore this complaint should be dismissed. Also, according to law, failure to disclose certain information to Plaintiff does not constitute fraud. In re: Haddad, Norton, supra; Matter of Curry, 12 B.R. 421, In re: Keller 72 B.R. 599

The question of lying or not is not settled by establishing the truth or falsity of what you say. In order to settle this question you must know whether it was meant to mislead. S. Bok, Lying: Moral Choice in Public and Private Life (1978), 6 (emphasis in original).

The language in Bankr. Code, 11 U.S.C.A 727 (a) (4) (A) requires that we draw this critical distinction before deciding whether the benefits of discharge should be withheld from the debtor. To come within the purview of the statute, it is not enough to establish that the verified statement in the petition was false. The objecting creditor must prove by a preponderance of the evidence that the debtor made a false statement fraudulently, that is, specifically with the intent to deceive. In re: Gonday 27 B.R. 428, 433, In re: Irving 27 B.R. 943, 945, In re: Gullifer 14 B.R. 183, 185, In re: Brame, 23 B.R. 196, 200 (Bkrtcy. W.D.Ky. 1982.

Bankruptcy Code 11 U.S.C.A. 727. As the debtors fresh start is one of the primary purposes of Bankruptcy law, exceptions to discharge must be strictly construed.

The [Supreme] Court on numerous occasions has stated that "one of the primary purposes of the Bankruptcy Act" is to give debtors a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. In re: Local Loan Co. v. Hunt, 292 U.S. 234, 244 [54 S. Ct. 695, 699, 78 L. Ed. 1230] (1934). In re: Thomas v. Ashley 5 B.R. 262 (1980), Mason Lumber v. Martin, 70 B.R. 146 (1986), In re: Butler v. Lind, 6 B.R. 374 (1980)

The House report accompanying the Bankruptcy Reform Act has described Section 727 as "the heart of the fresh start provisions of the Bankruptcy law". H.R. Rep. No. 595, 95th Cong., 1rst Sess. 384 (1977), U.S. Code Cong. & Admin. News 1978, pp. 5787, 6340. In re: Vickers, 577 F. 2d 683, 687 (10th Cir.

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Bankr. Rule 4005, Bankr. Code, 11 U.S.C.A. 727 (a) (2). The fact that Appellant used his wife to hold funds of the corporation is also in no way a reason for the Plaintiff or the Court to imply that there was an intermingling of both corporate and personal funds and because there was a very small amount of money used for personal expenses does not suggest a intermingling of funds. In fact the Appellant didn't even have a salary paid to him. Cohen v. Fox 47 B.R. 871, U.S. Bankr. Court, S.D. Fla. 1985.

Bankr. Code, 11 U.S.C.A 727 (a) (4) (A); Bankruptcy Rules Procedure Rule 4005, 11 U.S.C.A. The Appellee claimed that the Appellants wife benefited from the money received from the Corporation and that the judgment should be against her also but the fact of the matter is that neither the Appellant or his wife benefited from the corporation, in fact the condition of the Appellant and his wife with respect to the corporation destroyed their lives. Again the burden of proof is for the Appellee to prove that the Appellant has benefited and this has not been done. Cohen v. Fox 47 B.R. 871, U.S. Bankr. Court, S.D. Fla. 1985, In re: Keller 72 B.R. 599

Bankr. Act, 14 (c) (1), 11 U.S.C.A. 32 (c)(1); 18 U.S.C.A. 152 To justify denial of discharge of bankrupt on grounds that bankrupt knowingly and fraudulently made false claim in or in relation to his bankruptcy proceeding, testimony must not only be proven false and not result of error, mistake or inadvertence, it must also constitute intentional untruth. Kornreich v. Gullifer, 14 B.R. 183 D. Maine, 1981.In re: First National Bank v. Serafini, 113 B.R. 692

Subsequent to the date of the judgment of the District Court, in the United States Supreme Court in Grogan v. Garner, U.S., 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991) reversed the Eighth Circuit Court of Appeals and held that a " preponder-ence of the evidence" standard, rather that a "clear and convincing" standard applies to all exceptions from the dischargeability of debts contained in Bankruptcy Code 523 (a) , including the nondischargeability for fraud provision.

Bankr. Act, 14 (c) (1), 11 U.S.C.A. 32 (c)(1); 18 U.S.C.A. 152 Where there is no salary or nothing in the record to prove fraud the debt is to be discharged. In Re: Roberts v. W.P. Ford, 169 F. 2d 151, In re: Leichter 197 F. 2d 955.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No.95-55002
CASE # LA90-17562-LF
ADVERSARY # 91-60242-LF
BAP # CC-92-1779

Doug McKinney

Nayantara McKinney
Appellants

v.

Gigi Doyle Baldwin
Appellee

Appeal from theUnited States Bankruptcy
Court for the Central District of California

(Filed November 22, 1992)

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
James W. Meyers, Robert C. Jones, and
Christopher M. Klein, Judges Presiding

Submitted April 10, 1996
Before Hall, Thompson and Rymer, Circuit Judges

A. NATURE OF THE CASE:

This case arises from an alleged breach of contract by Doug McKinney (Appellant). A contract that was entered into on June 22, 1989 between Home Base Construction Inc. and Appellee Gigi Doyle Baldwin and signed by Appellant Doug McKinney a representative of Home Base Construction Inc. for the construction of a 900 square foot second story room addition. Home Base Construction Inc. was terminated from the project because of a number of reasons and Appellant Doug McKinney filed for personal Bankruptcy on July 17, 1990.

After learning about Appellants filing for Relief under 11 U.S.C. Section 701 et seq, Appellee filed a complaint on January 16, 1991 to Determine Dischargeability of a Debt.

B. COURSE OF PROCEEDINGS

During the course of the proceedings the Appellees attorney has tried to paint a picture to the court that the Appellant is an undesirable character and uncooperative, has lied on the Appellant and has displayed the qualities of an untrusting individual, namely Fredrick Greenblatt. Appellant made a motion to the Bankruptcy court to dismiss the case because the Appellee didn't file an objection to the discharge until after the time limit set by law and the proceedings continued. Appellant also made a motion to the court to dismiss the case because the Appellee or Attorney failed to appear but the court proceedings continued. After the trial proceedings the Honorable Judge Lisa H. Fenning ruled in favor of the Appellee on July 15, 1992 on the basis of Bankruptcy Rule 11 USC 523 (A) 2 and (a) 4, eventhough there was no evidence to support the Appellees case.

So Appellant filed an appeal from the Judgment IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT On or about November 22, 1992.

Discussion

I. NONDISCHARGEABILITY OF A DEBT

Bankruptcy Rules, Rule 8013 states:

On an appeal the District Court or Bankruptcy Appellate Panel may affirm, modify, or reverse a Bankruptcy Judge's Judgment, Order, or Decree or remand with instructions for further proceedings. Findings of fact, whether based on oral documentary argument evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Bankruptcy Court to judge the creditability of the witnesses.

Bankruptcy Rule 4005.

The statutory right to discharge in Bankruptcy is construed liberally in favor of debtor and strictly against objecting creditor and this did not take place. Bankr. Code, 11 U.S.C.A. 727 (a) (4) (A). In re: Leichter, 197 F.2d 955, 959, In re: Cycle Accounting Services, 43 B.R. 264, 270, In re: Kirst, 37 B.R. 275, 278, In re: Irving 27 B.R. 943, 946. In re: Decker, 595 F. 2d 185 (3rd Cir. 1979) In re: Gelfand, 47 B.R. 876 12 C.B.C. 2d 682 (Bankr. E.D. Pa. 1985). Roberts v. W.P. Ford, 169 F. 2d 151. Under 11 U.S.C.A 727 (a) (4) (A); the Court may refuse to discharge the debtors if they made (1) a false oath, (2) in or in connection with their bankruptcy case, (3) knowingly, and (4) fraudulently. The burden of proving each of these four elements rests on the creditor objecting to the discharge. Bankruptcy Rules Procedure Rule 4005 In re: Mascolo, 505 F.2d 274, 276, In re: Seablom, 45 B.R. 445, 449, In re: Kimzey, 761 F 2d 421 Cir. 1985.

The burden of proving elements of exception to discharge for making false oath rests on creditor objecting to the discharge and Plaintiff has nor has never had any proof because it isn't true.
Bankr. Code, 11 U.S.C.A 727 (a) (4) (A); Bankruptcy Rules Procedure Rule 4005, 11 U.S.C.A.
Reckless indifference to the truth is the equivalent of fraud for purposes of barring discharge for making false oath; but fraudulent intent must be actual, not constructive. Bankr. Code, 11 U.S.C.A 727 (a) (4) (A). In Re: Adlman, 541 F2d 999 (2d Cir. 1976). The objecting creditor must prove by a pre- pondenderance of the evidence that the debtors made the false statement fraudulently, that is, specifically with the intent to deceive.
In re: Gonday, 27 B.R. 428, 433, In re: Irving, 27 B.R. 943, 945, In re: Gullifer 14 B.R. 183, 185.
Appellant is not to be denied because information is missing or inaccurate, but because information was omitted or altered with the specific purpose of working a fraud.
In re: Seablom, 45 B.R. 445, 449, In re: Sylvester v. Stone, 11 B.R. 209 (1981)
The language in Bankruptcy Code, 11 U.S.C.A. 523 (a) (2) (A) says that to prevent discharge on grounds of false pretenses, false representation, or actual fraud, creditor must prove that debtor made knowing false representations with intent to deceive the creditor and that the creditor relied to his detriment as a result of the representation, and creditor bears burden of proving each element by clear and convincing evidence. In re: Simpson 29 B.R. 202, 209. In re: Vissers, 21 B.R. 638, 639.

The language in Bankruptcy Code, 11 U.S.C.A. 523 (a) (2, 6), 701 et seq.

There was no evidence that Appellant made any false representations in order to obtain a building contract from Appellee. Accordingly fraud has not been shown to to be part of Appellants actions. Therefore this complaint should be dismissed. Also, according to law, failure to disclose certain information to Plaintiff does not constitute fraud. In re: Haddad, Norton, supra; Matter of Curry, 12 B.R. 421, In re: Keller 72 B.R. 599

The question of lying or not is not settled by establishing the truth or falsity of what you say. In order to settle this question you must know whether it was meant to mislead.

S. Bok, Lying: Moral Choice in Public and Private Life (1978), 6 (emphasis in original). The language in Bankr. Code, 11 U.S.C.A 727 (a) (4) (A) requires that we draw this critical distinction before deciding whether the benefits of discharge should be withheld from the debtor. To come within the purview of the statute, it is not enough to establish that the verified statement in the petition was false. The objecting creditor must prove by a preponderance of the evidence that the debtor made a false statement fraudulently, that is, specifically with the intent to deceive. In re: Gonday 27 B.R. 428, 433, In re: Irving 27 B.R. 943, 945, In re: Gullifer 14 B.R. 183, 185, In re: Brame, 23 B.R. 196, 200 (Bkrtcy. W.D.Ky. 1982.

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADVERSARY # 91-60242-LF
BAP # CC-92-1779

Doug McKinney

Nayantara McKinney
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v.

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Appeal from theUnited States Bankruptcy
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(Filed April 12, 1996)

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
James W. Meyers, Robert C. Jones, and
Christopher M. Klein, Judges Presiding

Submitted April 10, 1996
Before Hall, Thompson and Rymer, Circuit Judges

The Bankruptcy Appellate Panels decision was to affirm the decision of the Bankruptcy Court in favor of Gigi Doyle Baldwin after a bench trial and decided that oral argument was not necessary.

App. 9

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CASE # LA90-17562-LF
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Doug McKinney

Nayantara McKinney
v.
Gigi Doyle Baldwin

Appeal from theUnited States Bankruptcy
Court for the Central District of California

On Petition For Rehearing
In The United States Court Of Appeals
For The Ninth Circuit

(Filed June 27, 1996)

Before: HALL, THOMPSON, and RYMER
Circuit Judges

The petition for rehearing is denied.